No. 92-1945

IN THE

Supreme Court of the United States

October Term, 1992

THE PITTSTON COMPANY, *et al.*,

Petitioners,

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' opposition ("Opp.") to the petition for *certiorari* ("Pet.") effectively demonstrates why the decisions of the lower courts in this case merit review by this Court. Nowhere do respondents deny that this case involves labor law issues of substantial importance to and impact on the United States coal industry. *See* Pet. at 11-14. And, more particularly, respondents' argument why their interpretation of the contract here does not amount to a waiver of petitioners' right to select their own bargaining representative demonstrates well why that is an important and certworthy issue.

Respondents also do not deny important aspects of the second and third questions presented by the petition. Specifically, respondents do not deny that: (1) there is substantial inconsistency in the circuits in applying this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and (2) a conflict exists among the circuits regarding the proper application of the doctrine of judicial estoppel.

I. RESPONDENTS' EFFORTS TO CHARACTERIZE THEIR INTERPRETATION OF THE CONTRACT HERE AS A BARGAINING "EXERCISE" AND NOT A "WAIVER" ONLY HIGHLIGHTS THE NEED FOR THIS COURT TO RESOLVE THAT IMPORTANT ISSUE.

Respondents do not deny that their interpretation of the contract here obligates petitioners to make contributions to the Trusts as required by collective bargaining agreements (including the 1988 NBCWA) to which petitioners are not signatories, and which were and will be negotiated by the BCOA, which is not petitioners' bargaining representative. Respondents also concede that under their construction of the contract, petitioners' employees are potentially perpetually locked into the UMWA Trusts whether or not petitioners' employees ratify a contract with different contribution terms or choose to remain members of the UMWA. *See* Pet. at 15-16. Nevertheless, respondents seek to characterize their interpretation of the evergreen clause as an *exercise* of petitioners' bargaining rights, not a *waiver* of their right to select their own bargaining representative. This is the same unavailing distinction relied on by the court of appeals in granting summary judgment.

Even accepting, for the sake of argument, respondents' definition of an exercise of bargaining rights as an agreement that fixes the parties' rights and forecloses further bargaining, it is a *waiver*, and not an *exercise*, of bargaining rights that is at issue in this case. There is no dispute that the alleged obligation to contribute to the Trusts is not a fixed obligation; rather, it is an obligation to contribute at rates *to be negotiated* by the BCOA and the UMWA. Under respondents' interpretation, the evergreen clause empowers the BCOA to negotiate future agreements on benefit issues into the indefinite future, foreclosing all employers who signed those NBCWAs from choosing their own representative for bargaining on those issues in the future.

Respondents go to great lengths to avoid the undeniable fact that the "evergreen" clause purports to delegate to the BCOA the power to negotiate on behalf of petitioners with respect to benefit

contributions. For example, respondents state that "[t]he evergreen clause is a contractual obligation which continues as long as . . . the BCOA and the UMWA *set* national contribution rates . . . ." Opp. at 5 (emphasis added). The BCOA and the UMWA do not merely *set* contribution rates—they *negotiate* the contribution rates, and they negotiate whether there will be any contributions. The respondents further characterize the contributions required under the clause as those *agreed to* in future NBCWAs. *Id.* However, the NBCWAs are collective bargaining agreements, and their terms are the result of *negotiations* between the parties. As a final example, respondents admit that the "evergreen clause is unique in that employers undertake a long-term obligation to make specified contributions" (*id.* n.3), but fail to state that the contributions "specified" are whatever rates are negotiated, from time to time, by the BCOA and the UMWA.

The fact that the so-called evergreen clause purportedly binds petitioners to contributions bargained for by the BCOA—which is not petitioners' chosen bargaining representative, and which does not even presently represent a majority of the industry—distinguishes this case from all of the cases cited in respondents' brief. In all of those cases (Opp. at 4 and n.2), the obligations of the parties were fully defined in the collective bargaining agreement. In none of those cases was any aspect left to be negotiated—*much less left to be negotiated by someone who did not represent the parties.*[1] Other than this case, we are aware

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[1] In *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991), the D.C. Circuit held that the waiver analysis did not control because the "union fully exercised its right to bargain" and eliminated any duty to bargain. *See also Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992) (waiver analysis does not control when the agreement "fully defines the parties' rights"); *UMWA, District 31 v. NLRB*, 879 F.2d 939, 944 (D.C. Cir. 1989) (same). Respondents also attempt to obscure the waiver issue presented by this case through comparison to cases that found that an employer had a duty to provide lifetime benefits to its employees. Opp. at 5 n.3. Respondents assert that there is no reason why federal labor policy should treat the long-term obligation to provide benefits any differently than the obligation to contribute to the Trusts. Respondents again fail to make the critical distinction between agreeing to

of no decision that confers upon a party's competitors the right to negotiate critical economic issues for the indefinite future, particularly where, as here, there has been no showing of a clear and unmistakable intent to waive Pittston's right to negotiate independently.

Thus, despite respondents' claims to the contrary, this case presents an issue of waiver. Because this case does implicate waiver of the right to bargain over benefits issues, the Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), is clearly not controlling. In *Amax*, the issue was whether the union could lawfully strike a company to force it to contribute to the very Trusts at issue in this case. The dispositive issue in the case was whether the trustees were the representatives of the employers for bargaining purposes. The Court found that the trustees were *not* the bargaining representatives of the employers who contributed to the Trusts. Based on that finding, the Court properly concluded that a union strike designed to coerce an employer to contribute to the Trusts did not force the employer to accept a bargaining representative not of its choosing in violation of Section 8(b)(1)(B) of the National Labor Relations Act.

Finally, contrary to respondents' suggestion (Opp. at 7), there is a conflict in the circuits as to whether the "clear and unmistakable" waiver standard applies to the construction of a collective bargaining agreement. *See* Pet. at 14-19. This Court has never reached that important question of federal labor law.[2]

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something that is fully defined (even if it is to continue after the expiration of the collective bargaining agreement) and agreeing to be bound to something which is to be defined through future bargaining by third parties. Respondents ignore the fact that it is not the length of the obligation that petitioners contend creates a waiver; rather, it is the fact that the extent of the future obligation can be bargained for only by the BCOA—not by petitioners.

[2] Respondents argue, in the alternative, that waiver was shown below by clear and unmistakable language. Opp. at 8 n.5. However, neither lower court held the so-called evergreen clause to be a clear and unmistakable waiver of petitioners' bargaining rights. Rather, both courts erroneously avoided the issue. Furthermore, the issues of material fact that exist preclude such a finding on

In sum, respondents' artful attempt to recast their interpretation of the contract here as an exercise of petitioners' rights, rather than a waiver in perpetuity of their right to bargain for themselves, merely highlights the importance of the question presented, particularly in light of the fact (not denied by respondents) that this question affects scores of companies in the United States coal industry and their employees.

II. RESPONDENTS CONCEDE THAT THE DECISIONS BELOW PRESENT IMPORTANT QUESTIONS ABOUT THE APPLICATION OF FED. R. CIV. P. 56.

Respondents do not dispute that the courts below engaged in weighing evidence and drawing inferences against non-movants on summary judgment motions—a practice contrary to the standards of Fed. R. Civ. P. 56 and this Court's decision in *Anderson*, 477 U.S. at 242. *See* Pet. at 21-22. Respondents try to support the courts' inferences *on the merits* solely by reference to the volume of evidence submitted by respondents that conflicted with petitioners' evidence. Opp. at 8-12. That is precisely the type of summary judgment analysis that this Court rejected in *Anderson*.

Respondents, as did the courts below, gloss over their continued enforcement of withdrawal liability. Opp. at 11-12. Respondents' position in that litigation seeking withdrawal liability was necessarily dependent on the assertion that an employer that is not a signatory to the current NBCWA is *not* liable to contribute to the pension and benefit trusts. Respondents' argument that "the Trusts [have] not contradicted [their] earlier sworn statements . . . because the evergreen clause was never at issue" is a transparent attempt to mislead. Opp. at 13. The fact that the withdrawal litigation did not put at issue respondents' assertion that employers that were not signatories to the current NBCWA were *not* bound to contribute to the Trusts obviously has no bearing on whether respondents made and relied upon that assertion in that litigation. Respondents do not and cannot dispute

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motion for summary judgment.

that they took a directly contradictory position on this issue in the withdrawal liability cases.

Respondents' argument with respect to Trustee Pierce's contradictory statements also makes petitioners' point that summary judgment was inappropriate: the courts below resolved that conflict and the credibility issue it raises by determining that Pierce's statements in support of respondents outweighed his statement that supported petitioners—all without the benefit of live testimony or cross-examination. Pet. at 33a. That is plainly not in keeping with the language of Fed. R. Civ. P. 56 or this Court's decision in *Anderson*.

Finally, respondents try to play down the compelling evidence introduced by petitioners in support of their motion for reconsideration by claiming that the courts below declined to consider their evidence. Opp. at 12. Respondents are wrong. The district court considered the evidence at length (Pet. at 54a-57a and n.8), and the court of appeals both reviewed the district court's decision *de novo* and discussed that conflicting evidence. Pet. at 5a. Both courts expressly engaged in weighing that evidence. Pet. at 12a, 56a.

Both the district court and the court of appeals—as have an increasing number of federal courts (*see* Pet. at 21-22)—affirmed summary judgment by drawing inferences and weighing evidence in favor of the movant and by ignoring genuine disputes as to material facts. Moreover, both courts below disregarded the clear directive of *Anderson* that where a heightened standard of proof is involved the evidence should be viewed "through the prism of the substantive evidentiary burden" (*Anderson*, 477 U.S. at 254)—here "clear and unmistakable" waiver—and that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor". *Id.* at 255.[3]

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[3] Respondents (Opp. at 8-9 n.6) gloss over the district court's conclusion that "although the Court considers the Trusts' contradictory positions to be some evidence that the evergreen clause was not intended to create the continuing obligation that the Trusts now seek to enforce, this evidence is greatly *outweighed* by the other evidence before the Court". (Pet. at 46a, emphasis

Respondents concede that the decisions below were entirely based on a weighing of the evidence in favor of movant and content themselves with an effort to satisfy this Court that respondents' evidence outweighed petitioners'. Respondents also concede that many other courts—disregarding *Anderson*--engage in weighing evidence and drawing inferences in favor of movants on summary judgment motions. *See* Pet. at 21-22. Those concessions, the record, and the decisions below demonstrate that this case and questions it raises relating to Fed. R. Civ. P. 56 merit review by this Court.

III. RESPONDENTS CONCEDE THAT THE CIRCUITS ARE DIVIDED WITH RESPECT TO THE DOCTRINE OF JUDICIAL ESTOPPEL.

The record below establishes that, over the ten-year period following the 1978 NBCWA, respondents repeatedly and successfully asserted in other litigations that signatories to the relevant NBCWAs had *no* continuing obligation to contribute to the Trusts if they had not signed the subsequent NBCWAs. Respondents' position in those other litigations is directly contrary to respondents' theory in this case. Notably absent from respondents' opposition is any denial that they took this directly contrary position consistently, repeatedly and successfully in other litigations.

Moreover, respondents concede that a conflict exists among the circuits on the issue of judicial estoppel. Respondents do not even attempt to dispute that the doctrine of judicial estoppel has been inconsistently applied, leading to conflicting results. Nor do they dispute that, while the doctrine of judicial estoppel has explicitly been rejected by the Tenth and D.C. Circuits, it has been embraced in varying forms by the First, Fourth, Fifth and Eleventh Circuits. Pet. at 24-25. Thus, respondents cannot dispute that guidance from this Court is necessary to resolve this conflict.

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supplied.) That is what the district court held. It is contrary to *Anderson* and is not an appropriate basis for granting summary judgment.

Respondents also do not directly dispute that, in rejecting petitioners' defense based on judicial estoppel, both lower courts improperly disposed of compelling evidence establishing the existence of disputed material facts. Respondents concede that judicial estoppel was intended to "bar inconsistent representations with respect to the same facts or claims". Opp. at 13. But respondents argue that their construction of the NBCWA in the withdrawal cases—that a signatory that failed to sign the subsequent NBCWA had no obligation to contribute to the Trusts and was therefore subject to withdrawal liability—does not constitute the same "facts or claims" as their position here—that while petitioners failed to sign the 1988 NBCWA and instead reached an independent agreement with the UMWA, petitioners were still obligated to contribute to the Trusts at the rates set forth in the 1988 NBCWA. That argument is simply untenable. The presence of contradictory constructions of the same contract is the paradigm situation requiring the application of judicial estoppel.

Respondents oddly assert that cases cited by petitioners support *their* point that judicial estoppel does not apply to this case because it does not "bar litigants from urging different . . . positions in cases involving unrelated parties". Opp. at 13. Respondents are wrong. For example, *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1548-49 (7th Cir. 1990), which respondents cite, involved an attempt by one party to prevail in a suit on a position inconsistent with one which was the basis for victory in a previous suit against a *different* party. The Seventh Circuit applied the doctrine of judicial estoppel to block that party from prevailing in the second suit on the basis of that inconsistent position. *Id.* In *Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir. 1993), the Seventh Circuit also used judicial estoppel to bar a litigant from prevailing on the basis of a position inconsistent with one taken in a previous case against an *unrelated* party.[4]

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[4] And while *Delgrosso v. Spang & Co.*, 903 F.2d 234 (3d Cir.), *cert. denied*, 498 U.S. 967 (1990), involves inconsistent positions in the same proceeding, it embraces judicial estoppel as a doctrine applicable to a party assuming inconsistent positions in separate proceedings: "To permit a party to

In short, respondents do not and cannot dispute that there is a deep conflict in the circuits on the existence and application of the doctrine of judicial estoppel. And, contrary to respondents' suggestion, their past conduct—the repeated, successful pursuit of a contract interpretation necessarily inconsistent with their theory here—squarely presents the question whether the doctrine of judicial estoppel applies in this case.

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assume a position inconsistent with a position it had successfully relied upon in a past proceeding 'would most flagrantly exemplify . . . playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate'". *Id.* at 241, quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioners' opening brief, the petition for a writ of *certiorari* should be granted.

June 11, 1993

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